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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 544

ABRAM P. STECKEL, *Petitioner*,

v.

REUBEN L. LURIE AND ABRAHAM T. ALPER, Co-Partners Doing Business Under the Firm Name and Style of LURIE & ALPER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FREDERICK BERNAYS WIENER,
1009-1015 Tower Building,
Washington 5, D. C.,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

ABRAM P. STECKEL, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on November 17, 1950.

OPINIONS BELOW.

The opinion of the district court on the right of the retired district judge to act in the absence of a designation (R. 333-334) is reported at 87 F. Supp. 702. The opinion of the district court on the merits (R. 321-324), less a para-

graph later omitted (R. 327), is reported at 79 F. Supp. 723. The opinion of the court of appeals (R. 389-407) has not yet been reported.

JURISDICTION.

The judgment of the court of appeals was entered on November 17, 1950 (R. 389). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether, in a jury-waived action by lawyers against their client for their fee, where the district court's opinion enumerates eight factors taken into account in fixing the reasonable value of the lawyers' services but where the findings set out only one of those eight, where neither the findings nor the opinion disclose just what the lawyers did or just what results they attained in litigation, and where the "fair and reasonable value" of the services rendered is determined as a conclusion of law, the findings of fact are adequate to show the factual basis for the district court's conclusion as required by Rule 52(a), F. R. Civ. P.

2. Whether, in a jury-waived action by lawyers against their client for their fee, where the client defends on the grounds, *inter alia,* of professional misconduct, including the lawyers' alleged failure to accept dismissal, their failure to surrender the transcript of record, their failure to state the amount of their charges, their assertion of a financial interest in the litigation, and their admitted failure ever to present a bill, and where the district court specifically stated that "in view of * * * professional considerations it would be wrong to allow the plaintiffs the amount they ask" but made no findings as to what those considerations were, there has been a compliance with Rule 52(a), F. R. Civ. P.

3. Whether, where a district judge has indicated in writing to counsel that he will grant a new trial if certain funds impounded in other lawsuits brought by the Government do not go to a particular company, he may *ex parte* refer to the orders in such other lawsuits, which were never introduced in evidence in the case in chief, without giving one of the parties an opportunity to show that the particular company's recovery was very substantially diminished by a subsequent Government tax assessment.

4. Whether, after a motion for a new trial has been filed, and a district judge makes and initials a memorandum which is duly sent to counsel for the parties, which indicates the action he plans to take on that motion, and which explains and justifies his delay in not disposing of it for fifteen months thereafter, the court of appeals may properly strike that memorandum from the record on appeal.

5. Whether orders in other lawsuits, which were neither introduced in evidence nor referred to in the proceedings in the case in chief, are properly a part of the record on appeal in such case in chief.[1]

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[1] In the event that a writ of certiorari should be granted in this case, petitioner intends to raise the following additional questions going to the merits:

6. Whether the refusal by lawyers of a client's proffer of part payment of a fee, offered without prejudice to the assertion of a further claim, and rejected in circumstances prejudicial to the client's interests, can be justified on the ground that the part payment was not in cash, where the lawyers never objected to the medium of the tender.

7. Whether, in an action by lawyers against their client for a fee, where the lawyers refused to accept their dismissal by the client, refused to surrender the transcript, refused to state the amount of their claim to the time of attempted dismissal or to accept security for the transcript, asserted a financial interest in the litigation (in which the client was a defendant) and insisted on continuing the representation in order to protect such interest, thereafter refused the client's proffer of an unconditional partial payment in circumstances prejudicial to the client, and never rendered a bill to the client before bringing suit, a court should approve such conduct as consistent with accepted professional standards so as to justify the allowance of a substantial recovery to the lawyers as compensation for services subsequent to such conduct.

RULES OF CIVIL PROCEDURE INVOLVED.

The Federal Rules of Civil Procedure involved in this case are set out in the Appendix, *infra,* pp. 27-29.

STATEMENT.

This petition seeks to review the affirmance of a money judgment entered in an action brought by two attorneys, respondents here, to recover the alleged value of their professional services from their client, the present petitioner.

The basic facts were stipulated at some length (R. 7-81); the statement which follows is a drastically condensed epitome of the record, designed simply to show the background out of which the questions now presented arise.

A. The Circumstances of Respondents' Employment.

The petitioner Steckel, inventor of a revolutionary method of rolling steel plates, was a director and minority stockholder in The Cold Metal Process Company, hereinafter referred to as Cold Metal, to which he had assigned his patents. Prior to the end of 1934, a bitter dispute had arisen between petitioner and his fellow directors, whom he accused of despoiling the company, and of conspiring to eliminate him from its direction and to wipe out completely his stock interests therein. The details as to petitioner's situation in early 1935 are stipulated at R. 8-10, 26-33.

At that time, petitioner retained the respondents Lurie and Alper "to represent him and to protect his interests in certain pending litigation in which Steckel was involved as a party and in all matters relating to Steckel's interest in The Cold Metal Process Company and his activities to protect said interest and to protect the assets of The Cold Metal Process Company" (R. 10).

Petitioner advised respondents that under existing conditions he would be unable to compensate them for their services on a definite and assured basis, "but that their compensation would have to be contingent upon the rea-

sonable value, if any, of the services rendered for Steckel and upon his ability to pay as represented by and based on the extent to which he could retain his stock against the attacks being made on him and the value which the stock developed" (R. 11-12).

It was stipulated (R. 9) that "The value of Steckel's stock interest in The Cold Metal Process Company was largely dependent upon the good faith, energy and skill with which litigation and negotiations, outside of court, with respect to protecting [its assigned] patent rights, would be carried on in behalf of the company," and further stipulated (R. 22) that neither respondents, nor Lee M. Friedman of the Massachusetts bar, whose services they provided (R. 18), had anything to do with any of the patent litigation, or with negotiations for settlement of patent litigation, in which Cold Metal was involved.

It was further stipulated (R. 21-22) that the value of Cold Metal stock would depend in part on the ultimate disposition of certain royalty payments which had been impounded in court to await the outcome of *United States* v. *Cold Metal Process Co.*, 164 F. 2d 754 (C. C. A. 6), certiorari denied, 334 U. S. 811, 835, and that (R. 22)—"The availability of this money to Steckel, so far as his share is concerned, depends upon whether or not further litigation in connection with it is pursued by the government."

B. Respondents' Services and Results Attained Thereby.

Respondents and Friedman rendered services to petitioner as follows:[2]

(i) *The Federal Case.* This was a stockholder's suit, *Thomson* v. *Cold Metal Process Co.*, in the U. S. District Court for Northern Ohio, which sought an accounting and

[2] It is not disputed that repondents and their associate devoted a total of 1539¼ days in rendering professional services for petitioner from January 31, 1935, to December 14, 1940 (R. 20; Fdgs. 2-3, R. 328).

a receiver; the details were stipulated (R. 13-15, 34-57).

Respondents and Friedman represented petitioner in the preliminary proceedings, the hearing before the master, the exceptions to the master's report, and the motion for rehearing thereon (R. 36-47). The argument on rehearing was made by another lawyer, because of petitioner's dissatisfaction with Friedman (R. 48; Ex. 16, R. 260; Ex. 18, R. 262; Ex. D(1), R. 317). Respondents did not attend the accounting hearings before the master. By the time final judgment was entered for Cold Metal, for $57,073.39 net (R. 49), Messrs. Bulkley & Butler of Cleveland had become principal counsel for petitioner (R. 15, 53-57, 114-115, 212-213). No receiver was ever appointed (R. 48, 53-54), although petitioner vigorously urged such relief (R. 48, 105, 200; Ex. 16, R. 260; Ex. 18, R. 262). In 1940, the respondent Alper rendered some assistance in the matter of ousting counsel representing Cold Metal, in consequence of which $30,000 in fees were repaid to the company (R. 56-57). Two Youngstown lawyers also represented petitioner in this case in addition to respondents and Bulkley & Butler (R. 35, 51, 244, 262, 265, 291, 292, 310).

(ii) *The Option Case.* This was a proceeding, *Standard Slag Co.* v. *Steckel,* in the Court of Common Pleas of Mahoning County, Ohio, to force petitioner to deliver 160 shares of Cold Metal stock for $56,000 in reliance on a purported option; the details are set out at R. 15-16, 57-62. Respondents and Friedman tried the case and lost it (R. 59-60), then took it to the Court of Appeals of Mahoning County and lost the appeal (R. 60-61). While a motion to certify the case to the Supreme Court of Ohio was pending, petitioner yielded because he was pressed for funds, and accepted the $56,000 for the 160 shares (R. 12, 15-16, 61, 107, 233-234; cf. Ex. C, R. 312-315). By reason of other judgments and attachments petitioner received only about $21,000 of the $56,000 (R. 109-110, 234).

(iii) *The Advances Case.* This was *Cold Metal Process Co.* v. *Steckel,* also in the Court of Common Pleas of Ma-

honing County, an action to recover from petitioner some $25,014.15 alleged to have been illegally advanced to him; the details are at R. 16-17, 63-68. Prior to respondents' employment, a verdict for $18,316.15 had been directed against petitioner after a trial. Respondents appealed, without success (R. 65-66), and were also unsuccessful in their Motion to Certify in the Supreme Court (R. 66).

It was stipulated (R. 16-17) that "It was desirable in the protection of Steckel's interest that, if possible, this judgment be reversed and in any event, that no levy of execution should be made to enforce it against Steckel's stock interest in The Cold Metal Process Company." Respondents did not succeed in reversing the judgment, and petitioner was obliged to surrender his 160 shares in the Option Case to obtain funds to meet pressing obligations (R. 109-110, 234), including this judgment. Of the four years' delay which ensued between the trial and the denial of the Motion to Certify (R. 65, 66), over two years were attributable to the congested calendar of the Court of Appeals (R. 65, items (j), (k), and (l)).

(iv) *Other Services.* The details of respondents' other services, in connection with the internal management of Cold Metal, with efforts to obtain financing, and with efforts to settle petitioner's controversies, were also stipulated (R. 17-18, 68-81). Respondents' efforts at settlement were unsuccessful (R. 75-81), and they obtained no financing satisfactory to petitioner (R. 72-75, 96-97, 232, 235-236), though they did require petitioner to pay a friend of theirs $5000 (R. 232). Respondents' services in connection with Cold Metal's internal affairs (R. 68-72) involved the study of documents, which was necessary in any event in connection with the trial of the Federal Case, as well as attendance at director's meetings, which would not have been necessary if they had succeeded in having a receiver appointed as petitioner urged (*supra*, p. 6).

C. The Circumstances of Respondent's Professional Conduct.

(i) *Petitioner's attempts to dismiss respondents from further representation.* Petitioner's increasing dissatisfaction with respondents' handling of his affairs (Ex. B, R. 306-311; Ex. 50, R. 293-296; R. 210-211, 229-230) came to a head in the summer of 1937, when, after the master had reported in the Federal Case, petitioner asked respondents not to ask for any extension of time for the filing of exceptions (Exs. 3-4, R. 245-251; R. 99-100). When respondents then asked for more time (Ex. 2, R. 244; Ex. 6, R. 252-253; cf. Ex. 12, R. 257), petitioner undertook to dismiss them, wiring (Ex. 5, R. 252; Ex. 8, R. 254), "* * * after deliberation I am putting the whole matter of preparation of exceptions and brief into hands of Rigelhaupt * * * I ask you express entire record of case to me tomorrow collect * * *"

Respondents refused to be dismissed; Lurie wrote (Ex. 9, R. 255):

> It is not necessary for me to remind you again, though I have done it now in two letters, of the great obligations you owe to us. If you are prepared to discharge this obligation, then, of course, you may handle affairs as you see fit; but in view of the obvious fact that you cannot discharge this obligation under the present circumstances, and in order to protect our own rights, we shall continue with the preparation of the Exceptions and the Brief. * * *

Lurie testified that, in using the expression "our own rights," he meant financial rights (R. 139).

Petitioner telegraphed again (Ex. 7; R. 253)—

> * * * Must have telegram before noon Wednesday stating when and how record shipped because dismissal from case on first notification deliberate and unconditional.

Respondents refused to ship the record or to accept dismissal, and insisted on preparing the exceptions and the brief (Ex. 10, R. 256). Meanwhile petitioner, on receipt of the letter in which Lurie insisted on continuing "in order to protect our own rights" (*supra*), called on respondents (Ex. 11, R. 256) to "wire present total obligations in dollars including Friedman and also number of shares of stock to be posted as security thus releasing record." But respondents adhered to their refusal and refused either to state the amount of their claim or the security they desired; Lurie replied (Ex. 12, R. 257):

> * * * It obviously is impossible for us to endeavor to work out at this time in dollars your obligation to us, nor in fact do we think it necessary. I may say, however, that we are not interested in allocation of your stock at this time as security to us under these circumstances. What we wanted you to realize was that you have had in us devoted and constant attorneys and that we have finally reached a point where we necessarily seek to protect ourselves from what we regard as an unnecessary and uncalled for attack.

Petitioner insisted on getting the record (Ex. 13, R. 258-259), but was shortly thereafter injured in an accident (Ex. 64, R. 305); at this juncture, away from home, he surrendered (Ex. 15, R. 260): "Better now you keep record and use it effectively." Respondents retained the record and filed exceptions and brief (R. 44).

Petitioner admitted that from that time until February 1938, respondents continued active in the Federal Case with his knowledge and consent (R. 99-100), "but only because they stayed in after I tried to kick them out in August, 1937. * * * They refused to give [the record], and refused to render a bill and stayed on, needlessly, on my payroll from there on without my will."

In February 1938, another dispute arose, based on petitioner's dissatisfaction over the handling of the Federal Case (R. 105-107; Ex. 16, R. 260; Ex. 18, R. 262), and peti-

tioner had occasion, once again, to dismiss respondents; he wired (Ex. D(1), R. 317), "Hereby advise I forbid oral appearance by you or Friedman my behalf Cleveland Monday and again ask you all voluntarily withdraw from federal case." Respondents once more refused to withdraw; Lurie wrote (Ex. D, R. 316-317):

> * * * I ask you to consider again the fact that you have had our complete loyalty throughout in this long drawn-out and fatiguing controversy with Cold Metal, and that you give thought also to the fact that we now have a vital interest in this entire litigation which we will protect to the utmost, and which we will not permit you through unjustified accusations to jeopardize in the slightest.

Lurie came to Youngstown, and, after a conference, petitioner relented (Ex. 17, R. 261).[3]

Thereafter, until about the end of 1940, respondents rendered legal services to petitioner in connection with the Federal Case (R. 15, 48-49, 53-57), although in 1939 petitioner had retained Bulkley and Butler as his primary counsel therein (R. 15, 53-57, 114-115, 212). Petitioner testified, referring to respondents' later services (R. 115),

> If it is true that he [Lurie] did come it was to bring the record which they were refusing to give up and I was helpless, and our lawyer was without it. That is what they kept themselves in what they call "employment" after I fired them for refusing to give up that very essential record. If you call that employment, all right.

The fact of the matter was that respondents had the record, Bulkley & Butler did not have it (R. 115-116)—and

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[3] In the cited letter, petitioner indicated (par. 4) that he never desired either respondents or Friedman to withdraw from the Option or Advances cases. Even in 1937, at the time of petitioner's first attempt to dismiss respondents from the Federal Case, he had wired (Ex. 11, R. 256), "Please soon propose terms for continuing other cases."

respondents still had the record at the time of the trial herein (R. 231, 242).

(ii) *Respondents' failure to submit a bill.* Although respondents asserted their retaining lien on the record to the end, they admit that they never submitted any bill for services (R. 139, 162), and in connection with their refusal to accept a partial payment on account in 1940-41, it is not disputed that they never told petitioner's counsel what their bill was (R. 214).

In 1937, when petitioner first attempted to dismiss them, they refused specifically to comply with his request that they indicate what was then owing (Exs. 11-12, R. 256-257).

Petitioner testified that, at a meeting in December 1940, respondents demanded 120 shares of Cold Metal stock plus $45,000 in cash (R. 238, 120). Respondents did not specifically deny making such a demand, though they did testify that they never attempted to get any of petitioner's stock during the period of their active employment (R. 129-130, 165). Thereafter, in the course of the correspondence which followed petitioner's offer of a partial payment, respondents indicated a willingness to submit a bill in dollars (Ex. 25 at R. 276; Ex. 26, R. 277; Ex. 27, R. 277-278). Later, however, they refused point-blank either to accept the tender of partial payment already made or to submit a bill in dollars, in the absence of a conference and a final agreement as to their ultimate compensation (Ex. 36, R. 285; Ex. 37 at R. 286; Ex. 38, R. 287). In fact, respondents never formulated their claim in terms of money until the complaint was filed herein (R. 4), five and a half years after the date of their last letter in this record (Ex. 40, R. 288).

(iii) *Respondents' refusal to accept an unconditional partial payment in circumstances prejudicial to petitioner.* After his December 1940 meeting with respondents (R. 238, 120), petitioner offered respondents $5000 in cash and 15 shares of Cold Metal stock, which he then valued at $4000 a share, in complete settlement (Ex. 23, R. 273; R. 120-121). He then caused 15 shares to be put in their names under

the escrow agreement under which his stock was held, so that they would receive certificates of beneficial interest plus all dividends accruing on the stock (R. 122). Early in January 1941, respondents received a check for $12,375, representing a dividend declared on those 15 shares (Ex. 25 at R. 275; Ex. 61 at R. 301).

Respondents were not satisfied with this arrangement (Ex. 41, R. 289; Ex. 61, R. 301-302), whereupon petitioner eliminated the "complete settlement" feature (Ex. 24 at R. 274). Considerable correspondence ensued (Exs. 25-30, R. 275-279), at the end of which petitioner's counsel wired that acceptance of the 15 shares and the $12,375 check on account would be without prejudice either to the making of a further demand, or to a valuation of the stock on a basis different from that made by petitioner (Ex. 31, R. 280).

None the less, respondents returned the check (Exs. 32-33, R. 281), and disclaimed any right to the stock (Ex. 40, R. 288-289). This had the effect of depriving appellant of a tax deduction, and required him to pay additional income taxes for 1940 in the amount of $42,519.94 (R. 122, 214-215, 221). Petitioner had earlier advised respondents that a rejection on their part would have this effect (Ex. 35 at R. 284), and in fact the additional tax made 1940 his heaviest tax year in a five year period (Ex. F, R. 319).

Lurie testified that his refusal and Alper's to accept the shares-plus-dividend-check was based, first, on the circumstance that their employment would not have permitted them to take advantage of the carry-back provisions of Sec. 107 of the Internal Revenue Code (R. 130, 226-227), and second, that acceptance would have required them to raise additional cash to pay the taxes due on the income represented by the stock (R. 131).

Respondents' contemporaneous letters, the burden of which was that no partial payment would be accepted in the absence of a final understanding as to the ultimate amount of respondents' compensation (Ex. 61, R. 301-302;

Ex. 25, R. 275-276; Exs. 27-28, R. 277-278; Ex. 33, R. 281; Exs. 36-38, R. 285-287), do not reflect the reasons which the respondent Lurie assigned on the stand as the grounds of respondents' refusal. And none of respondents' contemporaneous letters assert any objection whatever to the medium of petitioner's tender of partial payment.

D. Proceedings Subsequent to Trial and on Appeal.

The district judge filed an opinion in which he concluded that (R. 321)—

> In view of all the circumstances, the expenses advanced, the services rendered and accepted, it would be unconscionable and unjust to allow the plaintiffs nothing. On the other hand, in view of the circumstances, the relation of the parties, the correspondence, and professional considerations, it would be wrong to allow the plaintiffs the amount they ask.

He accordingly held (R. 324) "that a fair per diem allowance for an average of all the days would be $100," and in consequence caused judgment to be entered for $153,925 for services, and $7225.80—later corrected to $8738.07 (R. 327)—for expenses (R. 324, 327).[4]

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[4] On the same day that the judgment was thus modified, the district judge amended his opinion (R. 325-326) by omitting therefrom the following paragraph (R. 327):

> It may certainly be said that plaintiffs' adherence to the defendant's cause was more than professional ethics would demand—it may probably be said that it was more than exact professional standards should condone. But for the inability of the defendant to pay the plaintiffs, their continuation in his service could hardly be justified, they themselves would probably not attempt to justify it. The case exemplifies the truth which centuries of professional experience teaches, i. e., that the relationship of attorney and client and all professional relationships are based on mutual trust and cannot be forced. When that trust ceases, the relationship should end.

This amendment was effected informally (R. 325-326) and was not entered on the docket (R. 385-386).

The district judge's findings and conclusions covered only the following: Findings as to the fact and scope of employment, the agreement for compensation, and the time devoted to services for petitioner (Fdg. 1-3, R. 328); a finding as to the expenses advanced by respondents (Fdg. 4, R. 329); a finding that petitioner's Cold Metal stock was without market value at the time of respondents' employment and that it was of the value of at least $4000 per share at the termination of the employment (Fdg. 5, R. 329);[5] and conclusions of law as to the fair and reasonable value of respondents' services and as to the amount in which recovery should be had (R. 329).

There were no findings as to petitioner's attempts to dismiss respondents, nor as to their failure ever to present a bill, nor as to the circumstances and consequences of their refusal of an unconditional partial payment. And although the district judge stated in his opinion that he was fixing respondents' compensation in the light of eight enumerated factors,[6] he made no findings as to any of those factors other than the time spent.

Petitioner timely moved for a new trial and for oral argument thereon (R. 330). About a month thereafter, the district judge wrote and initialed a memorandum, copies of which were sent to counsel by the clerk, as follows (R. 332):

> This motion for a new trial should be held until disposition of the money impounded in the Clerk's office

[5] Significantly, there was no finding that, as had been stipulated (*supra*, p. 5), the value of Cold Metal stock was primarily dependent on the outcome of the company's patent litigation, and the respondents had no connection whatever with such matters.

[6] R. 323: "It therefore becomes the duty of this court to fix according to accepted standards the amount which the defendant should pay to the plaintiffs in view of [1] all the facts and circumstances revealed by the stipulation, [2] the evidence, and [3] the correspondence, taking into account [4] the age and experience of the plaintiffs, [5] the time spent, [6] the services rendered, [7] the amount paid to other counsel for similar services, and [8] the results." [Bracketed numbers added.]

> is determined. If that money does not go to Cold Metal, a new trial or modification of the judgment allowed in this case should be made.

Sixteen months after the motion, and almost fifteen months after this memorandum, without affording the parties an opportunity to show the disposition of the impounded funds or to prove whether or not the money in fact went to Cold Metal,[7] the district judge overruled both the motion for a new trial and the request for oral argument thereon.

On appeal (R. 335), petitioner designated, *inter alia*, the district judge's memorandum quoted above (R. 338, item 18), and respondents designated (R. 341-342) eight orders in the three other cases in which the Cold Metal funds had been impounded. Petitioner moved to strike the latter orders on the ground that they had not been introduced into evidence in the case in chief (R. 382). Respondents countered with a motion to strike the judge's memorandum (R. 383), and conceded that, if that memorandum were stricken, the other orders should likewise be stricken (R. 384). Notwithstanding this concession, the court of appeals granted respondents' motion to strike the memorandum but denied petitioner's motion to strike the extraneous orders (R. 407).

On the merits, the court below affirmed (R. 389-407).[8]

REASONS FOR GRANTING THE WRIT.

The importance of the present case for purposes of review by this Court lies in the disregard of the Rules of Civil Procedure which the record herein reflects. By affirming the district court's conclusion of law as to the fair

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[7] In fact, out of nearly $15,000,000 impounded by the United States and released (R. 342), about $8,450,000 was immediately thereafter seized by the United States under a jeopardy tax assessment.

[8] The point as to the district judge's competency to sit after retirement, extensively discussed in the opinion (R. 389-394), is not now in issue.

and reasonable value of legal services, reached without any findings of subsidiary facts on which that ultimate conclusion can rationally be predicated, the court below did precisely what this Court in *Kelley* v. *Everglades District,* 319 U. S. 415, held may not be done. A similar irregularity is involved in the attempt of the court below to resolve the alleged impropriety of respondents' professional conduct, strongly relied on by petitioner in defending their present action to recover a fee, in the absence of any findings whatever by the district court as to the incidents giving rise to petitioner's defense, even though the district court reduced respondents' recovery because of "professional considerations". Further irregularities are found in the action of the court below, at variance with rulings in other circuits, in striking and refusing to strike particular items from the record on appeal, and in the district court's *ex parte* reference to extraneous documents without permitting petitioner to overcome their effect.

Petitioner seeks review here, not to enforce the symmetry of the *elegantia juris* in a vacuum, but because, as will briefly be demonstrated, the failure of the tribunals below to adhere to the Rules promulgated by this Court has resulted in injustice, viz., petitioner's inability to defend against an excessive and essentially improper claim for legal services.

1. The district court undertook to fix the value of respondents' services in the light of eight enumerated factors (R. 323, quoted in note 6, *supra,* p. 14)—but made a finding of fact as to only one of those eight, viz., the time spent (Fdg. 3, R. 328)—which had been stipulated (R. 20). The district court determined the "fair and reasonable value" of respondents' services as a conclusion of law (Conc. 2, R. 329), a conclusion which it faintly supported by so much of its opinion as indicates that a flat per diem of $100 a day was applied to reach that valuation (R. 324). But there is nothing in the findings, and nothing in the generalized homilies of the opinion, which will enable any one to ascertain just what it was that respondents did in any particular

litigation or in any other activities, or what tangible results their own efforts obtained, that were worth $153,925.00 (R. 327). Consequently, there are no findings "sufficient to indicate the factual basis for the ultimate conclusion", as required by *Kelley* v. *Everglades District,* 319 U. S. 415, 422 (fairness *vel non* of plan for composition of drainage district's debts); and there are no findings "of subsidiary facts on which the ultimate conclusion of [fair and reasonable value] can rationally be predicated." *Ibid.* at 420. There is only a quotient judgment for almost precisely one-half of the *ad damnum* in the complaint (R. 4).

The court below, after saying that the findings of fact were not "clearly erroneous" within Rule 52(a), went on to say (R. 407), "The judgment was amply supported by the findings of fact and by the evidence."

Petitioner submits that, at the very least, the district court was bound to make specific findings as to the facts which it considered in arriving at its conclusion as to "the fair and reasonable value" of respondents' services and that, as in *Kelley* v. *Everglades District,* 319 U. S. 415, 420. "there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated."

Here there are no such findings. So far as the evidence is concerned, what this Court said further in the *Kelley* case is applicable here in full measure. There, after listing a number of "appropriate facts which might have been considered", the Court said (319 U. S. 421-422):

> It may be that adequate evidence as to these matters is in the present record. On that we do not pass, for it is not the function of this Court to search the record and analyze the evidence in order to supply findings which the trial court failed to make. Nor do we intimate that findings must be made on all of the enumerated matters or need be made on no others; the nature of the evidentiary findings sufficient and appropriate to support the court's decision as to fairness or unfairness is for the trial court to determine in the first

> instance in the light of the circumstances of the particular case. *We hold only that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion.* [Italics added.]

Petitioner's contention that it was similarly error not to make findings here is based, not on considerations of craftsmanship or mere artistry, but on the circumstance that findings on the critical points in controversy would have permitted his making the substantive argument that (a) the actual results attained by respondents were excessively meager and outstanding for lack of success, and (b) that the item primarily looked to by both courts below, viz., the appreciation in value of petitioner's Cold Metal stock (R. 322; Fdg. 5, R. 329; R. 399, 402), was a consequence of the ultimate validation of the Cold Metal patents (R. 9), with which respondents admittedly had nothing to do (R. 22).

Significantly, the district court did not find, what was the fact, that (1) respondents lost two of petitioner's three lawsuits and were partially successful in the third only after other lawyers had succeeded to the main responsibility (*supra*, pp. 5-7), that (2) far from helping petitioner keep his Cold Metal stock, their lack of success in the *Option Case* resulted in his losing 160 of his shares (*supra*, p. 6), or that (3) the accretion in the value of his stock, which alone made him a wealthy man, was not in any degree a consequence of their representation (*supra*, p. 5). Yet respondents were awarded large fees essentially because ultimate victory in the collateral patent litigation resulted in petitioner's ability to pay such fees.

Petitioner is not asking that this Court should review this case because of the minutiae of the dispute and the resultant injustice; he urges that review is warranted because of the disregard of the Rules of Civil Procedure which brought about that injustice.

2. The district court stated in its opinion (R. 321) that "in view of the circumstances, the relation of the parties,

the correspondence, and professional considerations, it would be wrong to allow the plaintiffs the amount they ask." What those "professional considerations" were can be ascertained neither from the opinion nor from the findings. Yet petitioner's principal substantive defense is based upon professional considerations.

That defense will be summarized here, not on the view that its validity or otherwise warrants review by this Court, but simply to demonstrate its substantiality and to underscore the irregularity of disposing of it without findings as to the material facts out of which it arose.

Briefly, petitioner's defense starts with the premise, that under the law of Ohio, which governed here,[9] he had an absolute right to dismiss his lawyers at any time. *Dodson* v. *Riddle*, 1 Dec. Rep. 54, 1 W. L. J. 393 (Ohio 1844); *Keyes* v. *Follett*, 41 Ohio St. 535, 539; *accord*, for the general law, *In re Paschal*, 10 Wall. 483, 496-497. That being so, respondents had no right to resist dismissal.[10]

Respondents' justification for doing so was petitioner's alleged inability to pay them their charges to date (R. 255) and their assertion that they had "a vital interest in this entire litigation which [they would] protect to the utmost * * *" (R. 317). Of course the law would not permit

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[9] Because the contract of employment was made in Ohio. *Roe* v. *Sears, Roebuck & Co.*, 132 F. 2d 829, 831 (C. C. A. 7); *Spellman* v. *Bankers' Trust Co.*, 6 F. 2d 799, 800 (C. C. A. 2).

[10] The opinion below seems to suggest (R. 403-404) that petitioner was unreasonable in attempting to dismiss respondents in 1937 for asking an extension of time for filing exceptions to the master's report. This overlooks the rule, see cases cited immediately above in the text, that the right of a client to discharge his attorney is an absolute right. If the discharge was for good cause, the attorney loses all right to compensation. *Woodbury* v. *Andrew Jergens Co.*, 61 F. 2d 736 (C. A. 2), certiorari denied *sub nom. Berenson* v. *Woodbury*, 289 U. S. 740. If the dismissal was without good cause, the attorney is entitled to compensation on *quantum meruit* for the work already done. *Marquam* v. *Vachon*, 7 F. 2d 607 (C. C. A. 9). But whether the dismissal was for good cause or not is immaterial on the right to dismiss; an attorney who resists dismissal is always wrong.

respondents to maintain their client's cause of action in their own interest, *Spellman* v. *Bankers' Trust Co.*, 6 F. 2d 799, 800 (C. C. A. 2), and since in the litigation covered by the parties' agreement (R. 9, 11) petitioner was a defendant and not a plaintiff, respondents could acquire no lien on the subject-matter of the lawsuits. *Wessinger* v. *Sturkie*, 77 F. 2d 751, 753 (C. C. A. 4); *Chancey* v. *Bauer*, 97 F. 2d 293, 294 (C. C. A. 5).

At most, therefore, respondents had a retaining lien on such of petitioner's property as had come into their hands by virtue of their employment. *Newcomb* v. *Krueger*, 36 Ohio App. 469, 471. Petitioner was entitled to a release of the papers held under that lien upon securing the payment of accrued charges (*In re San Juan Gold, Inc.*, 96 F. 2d 60 (C. C. A. 2); *Everett, Clarke & Benedict* v. *Alpha Portland C. Co.*, 225 Fed. 931, 938 (C. C. A. 2)), and in fact when petitioner asked for the return of the transcript, he asked respondents to state his present obligation and the amount of security they required (R. 256). But respondents refused to ship the transcript, professed inability to compute petitioner's obligation, and refused even to consider taking security therefor (*supra*, pp. 8-9). Petitioner's contention is that nothing in Ohio law—or elsewhere[11]—justifies the continued assertion of an attorney's retaining lien in such circumstances.

Consequently petitioner's position is that respondents' remaining in the case thereafter was improper and unprofessional; that their further services were accordingly officious; that petitioner's consent to their further employ-

[11] Respondents' asserted lien could not be justified by the law of their own state. While Mass. Gen. Laws (Ter. Ed.), c. 255, § 32 recognizes "liens claimed * * * by attorneys at law, upon books, papers, documents or other personal property * * *," Sec. 31 provides that " * * * The person claiming a lien upon said personal property shall, upon demand therefor, furnish the person owning or having an interest in said property with a statement of the amount and reasons, or other considerations, for which the lien is claimed."

ment, in view of their retention of the record, was involuntary because induced by commercial duress (*Lonergan* v. *Buford*, 148 U. S. 581; *Union Pac. R. R. Co.* v. *Public Service Comm.*, 248 U. S. 67), and that their improper conduct, thus uncondoned, would not support a recovery for any services rendered after the attempted dismissal.

The court below said (R. 405), "At no time did Steckel ever attempt to discharge or dismiss appellees as his attorneys." How this statement can be squared with Steckel's 1937 telegram (R. 253), "dismissal from case on first notification deliberate and unconditional," or with his 1938 wire (R. 317), "Hereby advise I forbid oral appearance by you or Friedman my behalf Cleveland Monday and again ask you all voluntarily withdraw from federal case," is indeed difficult to understand.

Petitioner is not urging this Court to review the case because the evidence establishes error in the quoted statement from the opinion below. Petitioner urges only that review is warranted because of the departure from accepted procedural standards involved in the approval by the court below of the district judge's failure to make any findings of fact whatever as to this essential—and substantial—issue.

3. The case presents other substantial—and disquieting—questions of professional conduct.

Admittedly, see p. 11, *supra*, respondents never, at any time, sent petitioner a bill for their services, nor is it disputed that they never reduced the amount of their claim to dollars until they filed the complaint herein (R. 4). The treatment of this point *sub silentio* by the court below is surely an extraordinary condonation of a grave breach of professional faith.

Additionally, respondents refused an unconditional tender of stock and cash, made without prejudice to their assertion of a larger claim, in circumstances highly detri-

mental to petitioner, after having been advised that their rejection would have that effect (*supra*, pp. 11-13).[12]

The point made at this time is that, since the district court reduced respondents' recovery because of "professional considerations", it was bound to make findings as to the nature of those considerations. The approval below of its failure to do so constitutes such a sharp and unjustified deviation from hitherto accepted criteria as to require review by this Court.

4. The remaining questions are intelligible only in their setting.

The parties stipulated that the availability to petitioner of the money impounded in consequence of *United States* v. *Cold Metal Process Co.*, 164 F. 2d 754, certiorari denied, 334 U. S. 811, 835—and the value of petitioner's Cold Metal stock—"depends upon whether or not further litigation in connection with it is pursued by the government" (R. 22; *supra*, p. 5). A month after petitioner moved for a new trial, the district judge made the following memorandum, notice of which was sent to counsel for the parties (R. 332):

> This motion for a new trial should be held until disposition of the money impounded in the Clerk's office is determined. If that money does not go to Cold Metal, a new trial or modification of the judgment allowed in this case should be made.

No evidence was introduced at the trial, nor afterwards by motion or affidavit, relative to the final disposition of

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[12] If certiorari should be granted, petitioner expects to argue (see Question 6, *supra*, p. 3) that the district court (R. 322) and the court of appeals (R. 404) both erred in holding that no tender was involved simply because the offer was not to pay in cash, since, unquestionably, respondents never objected to the medium of the tender. It is of course hornbook law that objection on the ground that an offer of payment was not in a medium constituting tender must be specifically made at the time, else it is not available afterwards. *Wilke* v. *Smith*, 68 N. E. 2d 386, 388 (Ohio); *Minsky* v. *Zieve*, 255 Mass. 542; *Restatement of Contracts*, Sec. 305.

the impounded funds. By denying, some fifteen months later, both the motion for new trial and the motion for oral argument thereon (R. 332), the district judge deprived petitioner of any opportunity of showing that, in fact, of the impounded funds involved which were released, the United States immediately seized $8,427,807.06, plus $22,-166.27 accrued interest, under a jeopardy assessment to recover taxes allegedly due.[13]

On appeal to the court below, petitioner designated the district judge's memorandum quoted above (R. 338, item 18). Respondents designated eight orders made in other litigation which had directed the return of certain of the impounded Cold Metal funds (R. 344-363; see R. 341-342, item 2). Respondents' motion to strike the district judge's memorandum (R. 383) was granted (R. 407), and petitioner's motion to strike the orders in other cases, on the ground that they had never been introduced in evidence or formally brought to the attention of the district court (R. 382), was denied (R. 407).[14]

A. The district judge's memorandum (R. 332), which alone explains his delay for well over a year in acting on the motion for new trial, was in substance and effect an interlocutory opinion, and as such the Clerk of the District Court was required by Rule 75(g) (*infra*, p. 28) to include that document in the record even in the absence of a designation.[15] True, it was not docketed (R. 332, 384-388); but it should have been, having regard to the command of Rule 79(a) (*infra*, p. 29), (It is proper to note that the record

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[13] The validity of this assessment is in litigation. *The Leon A. Beeghly Fund, etc. Petitioner*, v. *Comissioner of Internal Revenue*, No. 22485 in the Tax Court of the United States.

[14] No error is assigned as to the denial of petitioner's motion to strike the complaint in *Frederick R. Steckel* v. *Leon A. Beeghly et al.*, (R. 364-377), as that document was, at least in part, incorporated by reference at the trial (R.86-87).

[15] The older cases which insist that an opinion is no part of the record are therefore irrelevant. E. g., *England* v. *Gebhardt*, 112 U. S. 502, 503.

in this case reflects another similar failure on the part of the clerk to docket opinions (R. 385-386; cf. R. 325-326).) In any event, docketed or not, the July 1949 memorandum threw a clear light on the district judge's views, made plain that his delay in acting on the motion represented his considered judgment and was not the consequence of either neglect or inadvertence—and it was not simply an offhand or private remark, as the judge's action in initialing it and then sending it to counsel clearly shows (R. 332). Therefore the order of the court below striking the memorandum from the record was more than an abuse of discretion, it was a clear violation of the Rules of Civil Procedure. The action of the court below in this respect is in essential conflict with the ruling of the Eighth Circuit in *Love* v. *Royall*, 179 F. 2d 5, where a motion to strike from the record on appeal documents which had in fact been before the district court was denied, and with the ruling of the Ninth Circuit in *Bowles* v. *Dodge*, 141 F. 2d 969, which looked to the trial judge's opinion in order to find a clue to judicial action which the "record" proper did not otherwise explain.[16]

B. The district judge frankly announced that he would hold the motion for new trial until the disposition of the impounded funds, and that, if the money did not go to Cold Metal, a new trial or a modification of the judgment should be made. In fact, while the money impounded in one set of proceedings brought by the United States went to Cold Metal, a substantial portion of the same money was immediately seized by the United States in another proceeding, a tax matter. Thus the money in fact did not go to Cold Metal—but petitioner was deprived of any opportunity to show that fact.

The vice of the district court's action lay in its looking to the records in other cases without affording petitioner

[16] The order of the Chief District Judge (R. 343) overruling respondents' motion (R. 340, item 3) to strike the memorandum from the record may well rest on the circumstance that, under Rule 75 (h) as amended (*infra*, pp. 28-29), their point could only have been passed on by the court of appeals.

an opportunity to overcome the effects of those other records. The ruling of the court below, approving that course, is diametrically contrary to the Third Circuit's holding in *Funk* v. *Commissioner of Internal Revenue*, 163 F. 2d 796, where the Tax Court was reversed for doing just what the district court did here, viz., taking judicial notice of a record in collateral litigation without giving the affected party an opportunity to overcome the effects of that other record.

C. Since it was error on the part of the district court to look to orders in other cases which had never been introduced in evidence in the case in chief, such orders had no place in the present record, and should have been stricken therefrom. The refusal of the court below to do so was error. Its ruling in this respect is in conflict with the decision of the Third Circuit in *United States* v. *Hoffman*, 185 F. 2d 617, 621, pending on certiorari, No. 513, this Term, and the arbitrary character of its attitude towards petitioner is moreover highlighted by respondents' written concession that, if the district judge's memorandum were stricken, the collateral orders should likewise be stricken (R. 384).

The net result of the foregoing is that petitioner has been denied the opportunity to demonstrate a fact which the district court formally indicated would entitle him to relief, and that the court of appeals, by its erroneous and arbitrary disposition of the parties' motions to strike, has nullified the orderly scheme which the Rules of Civil Procedure prescribe for the settling of the contents of a record on appeal.

CONCLUSION.

This Court would be amply justified in saying here what it said of *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 261: "This case presents irregularities in practice which we think should not be overlooked." The irregularities here injuriously affected petitioner's substantial rights. The petition for certiorari should therefore be granted.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
1009-1015 Tower Building,
Washington 5, D. C.,
Counsel for Petitioner.

FEBRUARY 1951.

APPENDIX.

Rules of Civil Procedure Involved.

The following Federal Rules of Civil Procedure, as amended, are involved in this case:

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

* * * * * *

Rule 75. Record on Appeal to a Court of Appeals.

(a) Designation of Contents of Record on Appeal. Promptly after an appeal to a court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal, unless the appellee has already served and filed a designation. Within 10 days after the service and filing of such a designation, any other party to the appeal may serve and file a designation of additional portions of the

record, proceedings, and evidence to be included. If the appellee files the original designation, the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant.

* * * * * *

(g) Record to be Prepared by Clerk—Necessary Parts. The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof when a copy is required by the rules of the court of appeals. The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk may not require an additional copy as a requisite to certification.

(h) Power of Court to Correct or Modify Record. It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule and in Rule 76, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by

error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals.

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Rule 79. Books and Records Kept by the Clerk and Entries Therein

(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

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CHARLES ELMORE CR

In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. 544.

ABRAM P. STECKEL,
Petitioner,

vs.

REUBEN L. LURIE and ABRAHAM T. ALPER, co-partners, doing business under the firm name and style of LURIE & ALPER,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO ETITION FOR WRIT OF CERTIORARI.

JOHN J. ADAMS,
JAMES C. DAVIS,
1857 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Respondents.

SQUIRE, SANDERS & DEMPSEY,
1857 Union Commerce Building,
Cleveland 14, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5847

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT OF APPEALS.

Since the filing of the petition herein, the opinion of the Court of Appeals has been reported at 185 F. 2d, 921.

STATEMENT OF THE CASE.

This is a suit brought by the respondents to recover compensation for professional services rendered by them to the petitioner over a period of six years. The period involved extended from January 1, 1935 to December 14, 1940, during which time it is stipulated that the respondents expended 1539¼ days in the service of the petitioner. Respondents also sought to recover the amount of expenses advanced by them to the petitioner during the period they were serving him. The amount of such expenses is stipulated to have been $6,031.80, which with interest to the date of the judgment, aggregated $8,738.07.

A jury was waived and the case tried to the Court. The United States District Court for the Northern District of Ohio entered judgment in favor of the respondents and against the petitioner for $162,663.07, representing $153,925.00 for services and $8,738.07 for expenses (R. 327).

The Court of Appeals fully and independently examined the evidence and concluded with respect to the judgment and findings of the lower court:

> "The findings in this case were not clearly erroneous. The judgment was amply supported by the findings of fact and by the evidence." 185 F. 2d, 921, 932 (R. 407).

Most of the facts were the subject of a stipulation (R. 7 to 81). It is sufficient for an understanding of the case to state that petitioner was the inventor of processes for rolling steel which were covered by certain United States patents (R. 8). At the time petitioner employed respondents, his sole assets consisted of a minority stock interest in The Cold Metal Process Company, a corporation organized to exploit petitioner's patents (R. 8, 9). The Cold Metal Process Company itself was in financial difficulty, being in the hands of a Bankers' Committee, and petitioner was the object of efforts on the part of the majority directors of the company to take away from him his entire stock interest in the company (R. 9). Litigation with respect to the validity of the patents was pending (R. 8, 9).

It was petitioner's purpose in employing respondents that their efforts should be devoted to retaining for him to the maximum practicable his stock interest in The Cold Metal Process Company against the attacks being directed against him, with the hope that the stock so retained would ultimately prove valuable if litigation involving the patents proved successful (R. 11). Respondents were, therefore, employed to represent him in any litigation involving The

Cold Metal Process Company or his stock interest therein and to perform any other services for him which were not a part of litigation, but directed at preserving and enhancing his stock interest in the company (R. 11).

Petitioner was unable to compensate respondents for their services on a definite and assured basis, so it was agreed that their compensation would have to be on a contingent basis (R. 11). The contingency was to be based on the extent to which petitioner could retain his stock and the value which it should ultimately develop (R. 12).

As the Court found, and as the Record amply supports, petitioner's stock which was worthless at the time of the employment of respondents, attained a value at the time respondents' employment terminated of substantially in excess of $1,000,000.00 (R. 329, Finding 5). At the time of the trial, petitioner advanced the opinion that his stock was of a value of $17,000 per share, which for the 376 shares of stock which he had been able to retain represented a value in excess of $6,000,000.00 (R. 86, 87). It was in the light of this general background that the case was tried, findings made by the Court, and judgment entered.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

Stripped to their essentials and removed from the obfuscations of their verbiage, the questions presented by the petition are but two:

1. Do the findings of fact made by the trial court and concurred in by the Court of Appeals support the judgment?

2. Whether review by this Court will be granted because of harmless error committed by the Court of Appeals which the Record clearly discloses did not affect the merits or the result.

ARGUMENT.

In last analysis, the petition represents an effort to obtain still a third review of the factual issues involved in respondents' suit for fees for professional services and expenses. The petition does not disclose any question of general importance, or any substantial conflict between the decision of the court below and decisions of this Court, or of other Courts of Appeals or of Ohio courts.

To the extent that petitioner seeks further review of essentially factual questions, he is met by the well-settled rule of this Court that a writ of certiorari will not be granted to review factual questions which are the subject of concurrent findings by the two courts below. See for example, *Comstock v. Group of Institutional Investors*, 335 U. S. 211. To the extent that petitioner seeks review on other grounds, his petition is without merit.

The Trial Court Found and the Court of Appeals Concurred in the Finding of Ultimate Facts Necessary to Support the Judgment.

The pivotal question, and in fact the only one of substance, presented by the petition is whether or not the findings of fact, concurred in by both courts below, sustain the judgment. Petitioner does not claim that the findings made do not find full support in the evidence. His complaint, rather, is that the trial court, though finding the ultimate facts make no "findings of subsidiary facts" underlying the ultimate facts so found (Pet. 16). This is but to clothe in legal artistry a complaint that the trial court failed to detail the evidence. Such was no part of its duty.[1]

Both this Court and the Courts of Appeals have repeatedly held that the obligation of a trial court in finding

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[1] Petitioner refers to *Kelley v. Everglades District*, 319 U. S. 415, in which the trial court made *no* findings. Mere examination of the findings here discloses the inappositeness of the citation.

facts is to find ultimate facts upon which its judgment must rest rather than to find and detail the evidentiary, i.e. "subsidiary," facts, which underly and support the ultimate facts so found. Illustrative are the following cases:

Burr v. The Des Moines Railroad and Navigation Company, 68 U. S. 99, at p. 102:

> "The statement of facts on which this court will inquire, if there is or is not error in the application of the law to them, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest."

To the same effect, see *Miller v. Life Insurance Company,* 79 U. S. 285, at p. 301.

United States v. Jones, 176 F. 2d, 278 (Ninth Circuit), at p. 280:

> "Even in ordinary civil actions, when the court has reached a conclusion upon the main issues involved, and has decided them against a litigant, it needs only state the ultimate facts and need not make findings on every incidental fact which the litigant may have sought to put in issue."

Klimkiewicz v. Westminster Deposit & Trust Co., et al., 122 F. 2d, 957 (District of Columbia, Appeals), cert. den. 315 U. S. 805, at p. 958:

> "Criticism is made of the District Court's findings of fact on the ground that they are mere statements of generalities or conclusions and do not meet the requirements of Rule 52 of the New Federal Rules, 28 U. S. C. A. following section 723c, but we think this criticism is not justifiable. The trial court is not required to make findings on all the facts presented and need only find such ultimate facts as are necessary to reach the decision in the case."

To the same effect, see *Heath, et al. v. Helmick,* 173 F. 2d, 157 (Ninth Circuit), at p. 159, Footnote 4, and *Brown Paper Mill Co., Inc. v. Irvin,* 134 F. 2d, 337 (Eighth Circuit).

The Findings of Fact Made by the District Court and Concurred in by the Court of Appeals Speak for Themselves and Fully Support the Judgment.

The District Court, as was its right under the Federal Rules of Civil Procedure,[2] denominated some of its findings as such, included others in its opinion and also announced conclusions of law. The findings and conclusions so made speak for themselves and disclose that both courts below concurred in finding ultimate facts fully supportive of the judgment. The findings were as follows:

> 1. The petitioner and his situation presented very unusual problems. He was the inventor of a highly useful process of rolling steel. He owned a minority interest in the company which held the patents covering that process. The patents were in litigation in many courts and he was involved in extensive litigation with other stockholders over control of his company (R. 321).
>
> 2. The petitioner was fearful that the world was trying to steal his brainchild. This complete loss of faith became his worst affliction and made assistance to him difficult, if not impossible (R. 321).
>
> 3. Petitioner's entire fortune was in his stock. His affairs were intensely complicated and his condition often seemed desperate, but if he could retain his stock holdings until the patents were sustained, his fortune would be secure (R. 321).
>
> 4. They (respondents) assumed the representation of petitioner at a time when he was unable to pay, knowing that he would probably never be able to pay if the litigation regarding his patents failed to sustain his claims (R. 23).
>
> 5. On or about the 31st day of January, 1935, petitioner employed the respondents to represent him in any litigation involving The Cold Metal Process Company or his stock interest therein and to perform any other services for him which were not a part of

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[2] Rule 52(a), copied Appendix II.

litigation, but directed at preserving and enhancing his stock interest in the company, both parties agreeing that respondents' compensation would be contingent upon the reasonable value of the services rendered by respondents for the petitioner and upon petitioner's ability to pay, as represented by and based on the extent to which he could retain his stock against the attacks being made upon him and the value which the stock developed. Petitioner further agreed to pay to the respondents the amount of such expenses as were reasonably necessary to be incurred by them in connection with his representation (R. 328).

6. It was with reference to his affairs, other than the patent litigation, that respondents represented the petitioner (R. 321).

7. Respondents, by virtue of such employment, performed services as attorneys for petitioner during the period from the 31st day of January, 1935 to the 14th day of December, 1940, during which period respondents also provided as a part of their services, the services of Lee M. Friedman (R. 328).

8. Petitioner had no available funds, so respondents extended credit to him. They advanced their own expenses and even advanced cash to petitioner, which cash advances he repaid (R. 322).

9. Not all of respondents' services were strictly legal services. There was considerable time spent in peace efforts among directors, efforts to obtain financing, and numerous conferences, but there was also a vast amount of time spent by respondents and the more experienced trial counsel whom they retained (Lee M. Friedman) in trial work, briefing and argument against formidable opposition (R. 324).

10. Respondents and Lee M. Friedman devoted in rendering professional services for the petitioner, a total of 1539¼ days, 952½ of which days were in Boston, Massachusetts, and 536¾[3] of which days were

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[3] As stated by the Court of Appeals, this figure is an apparent misprint and should be 586¾ instead of 536¾. The stipulation between the parties states the figure to be 586¾ and it was so conceded in the briefs below (Stipulation, R. 81, Footnote to Court of Appeals' opinion No. 2 at 185 F. 2d 921, 929, R. 402).

outside of Boston, Massachusetts, principally in Ohio, and of which days outside Boston 83½ days were devoted by Lee M. Friedman to rendering services for the petitioner (R. 328).

11. Most of the time spent in Ohio was by the youngest of the three Boston lawyers and as to the time spent in Boston, it is probable that each day was not devoted exclusively to the petitioner's affairs. Other business was, no doubt, attended to (R. 324).

12. Most of the litigation in which respondents engaged was not successful if measured against the petitioner's wishes and claims, but the claim of the respondents that the efforts made in petitioner's behalf preserved his interests and prevented complete liquidation is not without merit (R. 322).

13. At the time of the employment of the respondents by petitioner, petitioner's stock in The Cold Metal Process Company was without market value, and at the termination of the employment, such stock was of the value of at least $4,000 per share and of an aggregate value substantially in excess of $1,000,000.00 (R. 329, 322).

14. Petitioner and respondents had differences, and petitioner forbade them to participate further in certain of the litigation pending (R. 322).

15. Petitioner subsequently withdrew his dismissal and re-established the relationship of attorney and client, and requested and accepted further services (R. 322).[4]

16. The patience and devotion of respondents to petitioner's cause was remarkable. Not many men would have been able to sustain their faith and confidence to such an extent and under such circumstances (R. 323).

17. Cleveland counsel rendered services for petitioner similar to those rendered by respondents during a term of one year and were paid about $20,000.00 (R. 323).

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[4] See Exhibit 17 at R. 261, offered in evidence at R. 116.

18. A fair per diem allowance to respondents for an average of all of the days spent in petitioner's services would be $100.00 (R. 324).

19. That during the period of their employment, respondents advanced expenses in connection with their representation of the petitioner in the sum of $6,031.80, which expenses were reasonably necessary to be incurred in connection with the representation by respondents of the petitioner, and no part of which has been paid; that the amount of such expenses, together with interest thereon at 6% per annum from December 14, 1940 (the termination of respondents' employment) was $8,738.07 (R. 329).

20. That the alleged offer of part payment for services made by the petitioner to respondents was not cash or the equivalent of cash and was not a tender. Respondents had a right to decline the offer (R. 322).

Upon the foregoing findings, the trial court concluded:

1. That it was his duty to fix the fee of respondents in view of all of the facts and circumstances revealed by the stipulation, the evidence and the correspondence, taking into account the age and experience of the respondents, the time spent, the services rendered, the amount paid to other counsel for similar services, and the results (R. 323).[5]

2. That the respondents were entitled to recover of petitioner the fair and reasonable value of the services rendered by them and of the services of Lee M. Friedman provided by them to the petitioner, and the amount of expenses advanced by them, with interest on said expenses at the rate of 6% per annum from December 14, 1940 (R. 329).

3. That under all of the circumstances of the case, the fair and reasonable value of the legal services rendered was $153,895.00, and the amount of expenses with interest was $8,738.07 (R. 329).

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[5] The age and experience of respondents and Lee M. Friedman was the subject of a stipulation between the parties, at pp. 23 to 26 of the Record.

4. That respondents were entitled to recover of the petitioner the agregate sum of $162,633.07 (R. 329).

It is submitted that the Court obviously considered all of the evidence and made all findings of ultimate facts necessary to support its judgment.

> "When the Court has reached a conclusion upon the main issues involved and has decided them against a litigant, it need only state the ultimate facts and need not make findings on every incidental fact which the litigant may have sought to put in issue."
>
> *United States v. Jones,* 176 F. 2d 278, 280.

The Allegations of Unprofessional Conduct Present Only Factual Questions Which Were Decided Adversely to Petitioner by Both Courts Below and Present Nothing For the Consideration of This Court.

Petitioner charges that he dismissed the respondents from his employ; that respondents refused to accept such dismissal; and that he offered respondents a partial payment for their services in stock of The Cold Metal Process Company, which they refused. He, therefore, says that respondents should not be entitled to compensation for their services.

There are two answers to petitioner's claims in these respects. In the first place, the facts, as stated or inferred in the petition, are without support in the Record, and in the second place, both courts below fully considered factual questions presented and decided them adversely to petitioner.

It would unduly prolong this brief to detail here the inaccuracies with respect to the Record which are found in the petition on this subject or to argue the merits of the factual issues presented. For the convenience of the Court, however, there is attached as Appendix I a statement of the record facts with respect to the questions presented, together with the findings and comments of the courts below with respect thereto.

The Claim of Error by the Court Below in Ruling on Motions to Strike Presents at Most a Question of Harmless Error Which Did Not Affect any Substantial Right of the Parties.

Petitioner (Pet. 22 to 25) complains of the action of the Court of Appeals in sustaining respondents' motion to strike from the Record an informal memorandum initialed by the trial judge on July 17, 1948 (R. 332), and in overruling petitioner's motion to strike from the Record certain orders of the District Court with respect to the release to The Cold Metal Process Company of several millions of dollars of funds, theretofore impounded in the registry of that Court. It was the respondents' position below, and still is their position, that neither the informal memorandum of July 17, 1948, nor the orders in question, were ever properly any part of the Record in this case.[6]

The memorandum was not an order nor evidence of any judicial act. The Court of Appeals, therefore, was clearly

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[6] It appears without dispute that the District Court's memorandum of July 17, 1948 was neither filed by the clerk nor entered on the docket, as would have been required by Rule 79(a) and (b) (copied in Appendix II) of the Federal Rules of Civil Procedure, had it been understood by either the judge or the clerk to have been a judicial act. It must be assumed that both the court below and the clerk were familiar with the provisions of the Federal Rules of Civil Procedure and intended to comply with their requirements. It must follow (and were the facts otherwise, petitioner would surely have obtained a certificate to that effect from the trial court) that neither the judge nor the clerk understood or intended the memorandum in question to constitute an order, judgment or other formal act of the Court. On its face, it was merely an informal memorandum reflecting the fleeting thoughts of the Court at the time in question, which he was free at any time thereafter to change or modify in any way he saw fit. It in no sense constituted a judicial act. When petitioner improperly designated for inclusion in the Record on appeal this personal and informal memorandum of the trial judge, respondents as a tactical move, not only filed objections to its inclusion, but designated for inclusion in the Record the orders in question but only "in the event that appellee's objections to the inclusion in the Record of Judge Wilkin's memorandum of July 17, 1948 * * * be overruled." (R. 341.)

right in striking from the Record the informal memorandum in question. Respondents concede that the inadvertent act of the Court of Appeals, in failing at the same time to purge the Record of the orders in question, may constitute error. Such error, however, was harmless, did not affect the substantial rights of the parties, and is no ground for the allowance of the petition.

In the first place, *there is absolutely no evidence that the orders in question or the facts which they represented, i.e., the release from the registry of the District Court to The Cold Metal Process Company of several millions of dollars, ever was considered either by the District Court or by the Court of Appeals in reaching the results which obtained in this case.* In the second place, the undisputed evidence properly in the Record, including the stipulation of the parties and the testimony of petitioner himself is entirely adequate to support the findings, concurred in by the two courts, and the judgment below.

The stipulated basis upon which the compensation of respondents was to rest was that it would be contingent upon "the value which the stock developed" (R. 12). The stipulation of the parties and the evidence of the petitioner contained full information, both as to the value of the stock at the time the employment of the respondents terminated and the value which it had attained by the time of the trial.

Petitioner testified that at the time of the termination of respondents' employment in 1940, his stock, in his opinion, was worth $4,000 per share, but that his associates in The Cold Metal Process Company valued the stock at this time at $7,500 per share (R. 85). The trial court apparently adopted respondents' more moderate estimate of the value of the stock and found that its value at the termination of respondents' employment was $4,000 per share, and of an aggregate value substantially in excess of $1,000,000.00 (R. 329, 322).

Of the original shares of stock which petitioner held, he was able to retain, as the result of respondents' efforts,

376 shares which at the value of $4,000 per share, were worth in the aggregate, at the termination of respondents' employment, $1,504,000.00.[7] *The trial court rested his judgment not on the value which the stock had attained at the time of trial, but on the value which petitioner's own undisputed evidence disclosed it had reached at the close of respondents' employment.*

In evaluating the judgment below and in determining the extent to which it is supported by the findings, there is no necessity to examine any evidence as to the value which the stock attained after the termination of respondents' employment, because the judgment was bottomed by both courts below squarely on a finding as to value at that time. However, the increase in the value of the stock between the time when respondents' employment terminated and the time of trial as reflected in the undisputed Record again emphasizes and underlines the conservatism of both courts below with respect to their findings on this aspect of the case.

It appeared that at the time of the trial, petitioner had already received in cash dividends $996,766.00 (R. 21). Moreover, he testified that, in his opinion, after the payment of such dividends, the stock had a residual value of $17,000 per share (R. 86, 87), or an aggregate value for the 376 shares of $6,392,000.00. It follows that no matter what value might be deduced from the facts reflected from such orders, it could not reach the estimate placed upon the stock by the petitioner in his own testimony properly in the Record.

It seems obvious, in the light of the foregoing record, that the inadvertent failure of the Court of Appeals to strike from the Record a series of orders which received

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[7] At the time of respondents' employment, petitioner held 580 shares of the common stock of The Cold Metal Process Company, 160 shares were lost by him in the so-called Option Case (R. 57-63) and 44 shares were sold by him from time to time to defray his living expenses during the period involved, leaving to petitioner 376 shares (R. 88).

the consideration of neither court below, if error, was harmless error, and without prejudice to the substantial rights of the parties.

> "Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. * * * He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners."
>
> *Palmer v. Hoffman,* 318 U. S. 109, 116.

CONCLUSION.

The petition discloses no question of general importance nor any conflict on any matter of substance between the decision of the courts below and any decision of this Court or of other Courts of Appeals or of the courts of the State of Ohio. Rather, the petition seeks merely to obtain a third review of facts with respect to the effect of which both courts below have concurred. The petition, therefore, should be denied.

Respectfully submitted,

JOHN J. ADAMS,
JAMES C. DAVIS,
1857 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Respondents.

SQUIRE, SANDERS & DEMPSEY,
1857 Union Commerce Building,
Cleveland 14, Ohio,
Of Counsel.

APPENDIX I.

Petitioner's Claim That Respondents Were Dismissed From His Service Is Contrary to the Undisputed Facts and Was Rejected By Both Lower Courts.

It was stipulated (R. 12, Par. 7) that respondents' obligations to petitioner's cause would include not only his representation in all litigation involving The Cold Metal Process Company or his stock interest thereon, but also the performance of other services for him, not a part of litigation, but which might be directed at preserving and enhancing his stock interest in the company. The courts below found that the services actually rendered included not only litigation in various matters, but also many other activities (R. 324). The employment was very general in scope. The petition itself discloses that the litigated matters handled by respondents included the "Federal Case," the "Option Case" and the "Advances Case," and that many other types of service were also rendered (Petitioner, pp. 5 to 7).

As his second reason for the granting of the writ, petitioner alleges that the Record shows that he dismissed respondents from his employ and that they refused to accept such dismissal. This fact is described as "Petitioner's principal substantive defense." The weakness of petitioner's case and the reasons why it was summarily rejected by both courts below becomes apparent upon even a cursory examination of the record.

The dismissal question arose not with respect to respondents' employment generally, but was limited to an effort by the petitioner to terminate respondents' employment in the Federal Case only, while retaining their services with respect to all other matters. The situation with respect to this matter was well summarized by the Court of Appeals in the following excerpts from its opinion in which we have inserted Record references supporting the Court's statements of facts:

"The present claim of appellant that he had discharged appellees as his attorneys is based upon an incident in one of the cases involving The Cold Metal Process Company in the District Couprt, referred to as the 'Federal Case.' That suit had been brought by a nominal plaintiff inspired by appellant seeking to obtain a receiver for the Company." (R. 34.)

"Hearing before a Special Master continued for a period of fifty-one days. The Record exceeded 3500 pages in length, in addition to 300 exhibits (R. 41). Prior to the filing of the Master's report, exhaustive briefs were filed by both parties, and there were three days of oral argument before the Master." (R. 42.)

"Thereafter, the Master filed his report consisting of 191 pages, containing 186 findings of fact, and 24 conclusions of law." (R. 42.)

"On July 30, 1937, the day on which the report was filed, appellant informed appellees that no delay beyond the regular 20 days should be obtained in which to file exceptions, but that the report would have to be attacked boldly and openly as a brazenly prejudicial report * * * by a few proofs of prejudice. I do not mean mere bias, which might be unconscious bias, but downright crooked procedure, consciously designed to protect Beeghly where proofs of his guilt are plain." (R. 45.)

In this situation, respondents and petitioner exchanged substantial correspondence in which respondents sought to explain to petitioner that his substantial rights would be seriously affected if his instructions were to be followed out, which culminated in a meeting between respondents and petitioner, the results of which were set out in a letter

from petitioner to respondents quoted in the footnote.[8] (Exhibit 17, at R. 261, offered in evidence at R. 116).

By his own words, petitioner thereby made it clear that he never intended to dismiss respondents at any time and that the misunderstanding with respect to the Federal Case had been fully resolved.

Here again, both courts below concurred in the conclusion that, if anything, respondents' dismissal by petitioner was partial only and that even to the extent it existed, the dismissal was withdrawn and the complete relationship renewed. The trial court so found (R. 322, 323) and the Court of Appeals clearly confirmed such finding in the following language:

> "At no time did Steckel ever attempt to discharge or dismiss appellees as his attorneys. The most that

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[8] "397 Redonda Road
Youngstown, Ohio.
February 26, 1938.

Mr. Reuben Lurie,

Dear Lurie:

This is to express:

(1) my personal gratitude to you for having come all the way to Youngstown to discuss all our mutual affairs to date instead of my having to travel at all just now to meet you, as had been my intention—

(2) my personal relief after candid discussion of matters in which we had drifted too far apart as a result of the too long distance between Boston and Youngstown—

(3) my belief that this conference will result in best cooperation between us in all the future—

(4) my surprise at seeming to have been misunderstood to desire withdrawal of Lurie and Alper or of Friedman from Option Case or of L. and A. from Advances Case,—neither of these thoughts having been thoughts of mine—

(5) my desire to have all of you remain connected with Federal Case under mutual understanding between us (you and me, Lurie and Steckel) as to what each side (Boston and Youngstown) shall not do independently of the other.

Sincerely yours,"

> he purported to do was to dismiss them from further proceedings in one case out of several in which they were engaged; * * * As to the case in which he attempted to discharge them from preparation of exceptions and brief, such attempted dismissal was withdrawn by Steckel as soon as the parties had a personal interview * * *. We find no merit in the claim that appellees were discharged by Steckel as his attorneys; that they wrongfully continued to represent him; and that, because of such discharge and their conduct, they forfeited any right to compensation for the services they performed on behalf of Steckel up to that time, and subsequently." 185 F. 2d 921, 931 (R. 405).

If this alleged dismissal constitutes "petitioner's principal substantive defense," the concurrent findings of the two lower courts should surely be dispositive of the case.

The Alleged Tender of Partial Payment Made by Petitioner to Respondents Was One Which They Were Neither Personally Nor Professionally Obligated to Accept or Consider.

Petitioner alleges that respondents should be penalized in this Court because they allegedly "refused an unconditional tender of stock and cash, made without prejudice to their assertion of a larger claim, in circumstances highly detrimental to petitioner, * * *." (Petition, pp. 21, 22.) Petitioner further states to this Court that he "offered respondents $5,000 in cash and 15 shares of Cold Metal stock, which he then valued at $4000 a share, in complete settlement." (Petition, p. 11.)

These and similar statements included in the petition simply do not reflect the facts as the record discloses and as both lower courts found.

The fact is, as reflected by petitioner's own testimony, that what was offered to respondents was not 15 shares of

stock in The Cold Metal Process Company, but rather a beneficial interest, only, in a single stock certificate representing 420 shares of the stock of The Cold Metal Process Company, which was impounded in escrow in a bank in Pittsburgh. Moreover, the alleged beneficial interest was to be subject to the retained right of the petitioner to alienate or dispose of the underlying stock at any time and on any terms which he deemed appropriate, without respect to the wishes of the respondents. That there may be no dispute about this fact, we set out the testimony from page 121 of the Record:

> "Q. This offer then, in effect, was to give them not 15 shares of stock but a certificate of beneficial interest in a certificate for 420 shares of stock in escrow with the bank?
>
> A. Well, true, but they were to get every cent of its value.
>
> Q. And under terms and conditions where you retained the right to sell that stock represented by the certificate of beneficial interest at whatever price you might determine upon?
>
> A. Yes.
>
> Q. So long as they got the same price as you did?
>
> A. True.
>
> Q. So they had no power over the disposition of that stock?
>
> A. Under this arrangement, no, *I had all that in my own hands.*
>
> Q. Now, it is true, is it not, that Lurie and Alper rejected that offer?
>
> A. Yes."

In this state of the Record, surely petitioner has no right to complain of the concurrent findings of the courts below that the rejection of the so-called tender was proper. (District Court Findings at R. 322, Court of Appeals concurred at 185 F. 2d 921, 930, R. 404.)

APPENDIX II.

Rules of Civil Procedure Involved.

The following Federal Rules of Civil Procedure, as amended, are involved in this case:

"Rule 52. Findings by the Court.

(a) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948."

"Rule 79. Books and Records Kept by the Clerk and Entries Therein.

(a) Civil Docket. The clerk shall keep a book known as 'civil docket' of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted

chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word 'jury' on the folio assigned to that action. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

"(b) Civil Judgments and Orders. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949."